Supreme Court, U.S.
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NO. 86,610

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BEVERLY L. BREAUX,
Appellant

v.

ALLIED BANK OF TEXAS,
TEMPORARY GUARDIAN OF THE
ESTATE OF NORA EICHORN, N.C.M.,
Appellee

ON APPEAL FROM
THE SUPREME COURT OF TEXAS

MOTION TO DISMISS OF APPELLEE

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To The Supreme Court Of The United States:

NOW COMES Allied Bank of Texas, Temporary Guardian of the Estate of Nora Eichorn, N.C.M. ("Ward"), Appellee ("Appellee"), and moves that the Court dismiss the entire claim of Beverly L. Breaux, Appellant ("Appellant") herein, and in support thereof would respectfully show the Court as follows:

This is a suit for payment of attorney's fees ancillary to a contested guardianship proceeding. Appellant alleges that she entered into a binding contract for legal services with the Ward during the pendency of the related temporary guardianship and that the alleged contract with the Ward was binding on the guardianship estate.

Appellant raises three constitutional challenges: (1) the validity of Texas Probate Code ("TPC") § 131(b) in providing for the institution of a temporary guardianship without prior notice, on due process grounds; (2) the validity of TPC § 419 in allowing a new trial for a person for whom a jury verdict of competent has been returned, on equal protection grounds; and (3) the court practice of appointing the same person as temporary guardian and attorney ad litem on behalf of the Ward, on the due process ground that a conflict in such roles results in denial of effective assistance of counsel.

I. Constitutional Issues Not Timely and Properly Raised.

A federal question "which was not timely or properly raised and was not expressly passed on" will be dismissed. SUP. CT. R. 16.1(b). Stated another way, the federal question must either be (i) considered and passed on by the highest court of the state, *Whitfield v. Ohio,* 297 U.S. 431 (1936), or (ii) timely and properly raised in the state courts.

Where the highest court of the state declines or omits to consider the federal question, as in this case, the Supreme Court of the United States will refuse to review a federal question not properly raised in the trial court. *Pennsylvania R. Co. v. Illinois Brick Co.,* 297 U.S. 447 (1936), *Jennings v. Illinois,* 342 U.S. 104 (1951).

In this connection, the authority cited by Appellant (J.S. - p. 5) to support review by this Court stands for the proposition that review is appropriate regardless of when the question was raised if the highest state court, expressly or by necessary implication, passed on the federal question. The complete quote from Appellant's authority states as follows: "[I]t is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough." *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63 (1928).

However, absent an express or implied decision by the highest state court, the federal question must be raised "in due time." *Id.* at p. 67. In addition to the requirement that the federal question be timely raised at the trial court level, a presumption exists regarding the omission of the highest state court to decide the federal question. Where the highest state court fails to pass on the federal question, it is presumed that the omission is due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary in the Supreme Court of the United States. *Webb v. Webb,* 451 U.S. 493 (1981), *citing Street v. New York,* 394 U.S. 576 (1969).

As reflected in Appellant's Jurisdictional Statement, the constitutional challenge to TPC § 131(b) was not made until Motion for Rehearing in the 14th Court of Appeals of Texas (J.S. - p. 12). Appellant's remaining two constitutional challenges, relating to TPC § 419 and the purported conflict of appointed counsel, were not asserted in this cause until Appellant's post-trial Motion to Set Aside Order Granting Summary Judgment for Defendant (J.S. - p. 9). The assertion of the latter two

challenges in the post-trial motion was not timely raised because it could have been raised in Appellant's Response to the Motion for Summary Judgment. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

With respect to the timeliness of the claim of invalidity of TPC § 131(b), Appellant alleges the intermediate appellate court's opinion was "a surprise, which could not have been reasonably anticipated from prior decisions." (J.S. - p. 10). The prior decisions to which Appellant's Jurisdictional Statement makes reference held that a temporary guardianship was not a final adjudication of incompetency. (J.S. - pp. 11-12). The opinion of the 14th Court of Appeals of Texas in this case adheres to this rule of law from these prior decisions: "We agree that there has been no final adjudication of incompetence." (J.S. - p. A14).

The decision of the 14th Court of Appeals of Texas stands for the simple proposition that an attorney who institutes a temporary guardianship for a ward cannot enter into a binding contract for legal services without court approval. Appellant's services were rendered during the pendency of the guardianship proceeding while both a guardian of the person and a guardian of the estate were acting under court authority on behalf of the Ward.

This holding was of no surprise under Texas law. The Order appointing Appellee makes it clear that Appellee was charged with the responsibility, as Guardian of the Estate, to take possession of, preserve and protect all of the Ward's property. Appellee became fully accountable for all of the Ward's property under Section 134 of the Texas Probate Code. It is not possible for this responsibility to coexist between the Ward and the Guardian.

In this connection, Appellant's Jurisdictional Statement provides, "Of further surprise, was the opinion at

page 7 (App. A23): 'Appellant has failed to show any of the alleged legal services rendered were necessaries.' " (J.S. - p. 12). In view of established Texas law, the holding of the intermediate appellate court should not have been a surprise. *Bowman v. Bowman,* 96 S.W.2d 667 (Tex. Civ. App.—Eastland 1936, no writ), held that where a guardian provides a ward with necessaries, the ward cannot bind himself to a stranger for the same. In *Dallas Trust and Savings Bank v. Pitchford,* 208 S.W. 724 (Tex. Civ. App.—Dallas 1919, no writ), the law is stated very clearly:

> It is the duty of a guardian to furnish his wards, whether infant or non compos mentis, with necessaries, and if a guardian fails or refuses to maintain a ward out of his estate, etc., he should be compelled to by the remedies provided, and a third person is not justified in discharging the guardian's duty. *Id.* at p. 726.

The *Pitchford* court also stated, "[W]e can see no good reason why a third party, who voluntarily incurs such expenses with knowledge of the pendency of the guardianship, should be allowed to recover." *Id.* at p. 726. Thus, there is no foundation to Appellant's claim of surprise with respect to the opinion of the 14th Court of Appeals of Texas. None of Appellant's three constitutional challenges was timely raised.

Each federal question must also be "properly" raised in the cause of action. SUP. CT. R. 16.1(b). Appellant's three constitutional challenges have not been properly raised because one cannot invoke the appellate jurisdiction of the United States Supreme Court to vindicate a right of a third party. *Liberty Warehouse Co. v. Burley*

Tobacco Growers' Co-op Marketing Assn., 276 U.S. 71 (1927). These challenges are to the validity of statutes and practices regulating the rights of the Ward. These challenges are totally independent of the right of Appellant to be paid for her volunteered legal services to the Ward.

Even if Appellant could assert such challenges on behalf of the Ward, which is hereby denied, such constitutional attacks must be by direct suit for that purpose rather than by collateral attack. *Walker v. City of Birmingham*, 388 U.S. 307 (1967), *State v. Gardner*, 54 Ohio St. 24, 42 N.E. 999 (1896).

II. The Constitutional Challenges Do Not Constitute Substantial Federal Questions.

It is well-settled that this Court will not assume jurisdiction of issues that are merely academic or episodic, particularly when the issues are constitutional in nature. Settlement of the controversy must be important to the public as distinguished from the parties. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

Appellant alleges the three constitutional challenges are substantial federal questions likely to evade this Court's review, "because elderly wards will usually: 1) die before their federal constitutional claims can be brought to this Court, and 2) be represented by court-appointed attorneys who, failing to serve as true advocates, are unlikely to pursue such appeals." (J.S. - pp. 2-3). The Texas guardianship statutes and practices in controversy apply to all wards, of whatever ages, and the fact that some wards may die before their claims could be brought to this Court does not indicate a substantial

federal question. Secondly, there is no presumption that court-appointed attorneys fail to serve as true advocates to pursue such appeals. As pointed out in Appellant's Jurisdictional Statement, the obligations of an attorney appointed by the Court are no different from those of a privately retained lawyer. *State ex rel. Memel v. Mundy,* 75 Wis. 2d 276, 249 N.W.2d 573, 577 (1977).

Turning to each of the three constitutional challenges separately, review is first made of the significance of the federal question related to the alleged invalidity of TPC § 131(b), for lack of due process of law (J.S. - p. 12). As reflected in the Appendix to Appellant's Jurisdictional Statement (J.S. - pp. A38-39), TPC § 131 as applicable during the Ward's guardianship, provided for temporary guardianships of persons of unsound mind, without prior notice. However, two aspects of the Texas temporary guardianship procedure make it immune to Appellant's constitutional attacks: (1) it was based on an immediate need resulting from the Ward's mental and physical regression, and (2) the Probate Court only granted Appellee the limited powers specified in the Order of Appointment. The powers of temporary appointees are tailored by the probate court to fit the needs of each case. *Ex parte Lindley,* 163 Tex. 301, 354 S.W.2d 364 (1962).

This Court has determined that due process requirements for civil commitments are less stringent than criminal proceedings because less deprivation of liberty and stigma are involved. *Addington v. Texas,* 441 U.S. 418 (1979). Certainly this is true to a greater extent when comparing temporary guardianships to permanent guardianships or court-ordered civil commitments.

Appellant alleges:

> The 1985 revision of § 131 (which added due process protections and now recognizes the right and power of a temporary ward to "retain" "independent counsel"), is the *strongest evidence* that the prior § 131 was constitutionally defective. . . . (J.S. - pp. 48-49; emphasis in original).

Appellant neglects to mention that the entire focus of TPC § 131 has changed from a protection of persons of unsound mind to a protection for incapacitated persons, whether physically or mentally incapacitated (J.S. - p. A44). The former statute has been virtually replaced by a statute for the benefit of an entirely different class of persons. A question that was once a substantial federal question may become insignificant and no longer deserve review by the Supreme Court due to an intervening repeal of the statute in question. *Morris v. Weinberger,* 410 U.S. 422 (1973). Even if the prior TPC § 131 raised a substantial federal question, which is hereby denied, the amendment of that statute has eliminated the necessity for review by this Court.

Finally with respect to TPC § 131(b), it is a well-settled rule that one who voluntarily proceeds under a statute and claims its benefits will not be heard to question its constitutionality in order to avoid its burdens. *Fahey v. Mallonee,* 332 U.S. 245 (1947). In this case Appellant sought the benefits of TPC § 131(b) by instituting the original temporary guardianship for the Ward under that statute. She cannot now be heard to complain of the constitutionality of that statute.

Appellant's second constitutional challenge relates to TPC § 419, under which a new trial can be granted re-

garding the final adjudication of a ward's incompetence. Appellant alleges that this statute is unconstitutional, "as a violation of the 'equal protection' clause of the 14th Amendment, because Texas law does not permit a new trial after a jury verdict favorable to an accused criminal nor to a proposed mental patient." (J.S. - p. 10).

This Court has pointed out that laws need not affect every man, woman and child exactly alike in order to avoid the constitutional prohibition against inequality. *Stebbins v. Riley,* 268 U.S. 137 (1925). The Equal Protection Clause does not forbid discrimination with respect to things that are different. *Rinaldi v. Yeager,* 384 U.S. 305 (1966). Furthermore, proposed incompetents do not constitute a suspect classification deserving strict scrutiny in evaluating the application of the Equal Protection Clause. The strict scrutiny test requiring a compelling state interest to allow a law to stand, referred to in Appellant's Jurisdictional Statement (J.S. - p. 49), is inapplicable.

Even if TPC § 419 were determined void as applied to proposed incompetents, the effect of a new trial could be achieved by the filing of a new application for permanent guardianship following a jury verdict finding the proposed ward competent. Therefore, striking down TPC § 419 would not eliminate the possibility of obtaining successive new trials regarding competency. The question of whether TPC § 419 is violative of the Equal Protection Clause is not a substantial federal question.

Appellant's third constitutional challenge relates to an alleged violation of a due process right to an attorney of the Ward's choice, "who would serve as her true advocate" (J.S. - p. 9). The Texas Probate Code procedure

under which the attorney ad litem for the Ward in this case was appointed is discretionary with the court, as pointed out in Appellant's Jurisdictional Statement (J.S. - p. A40). Under the statute, TPC § 113(a), the attorney ad litem is to "represent the interests of the person for whom the permanent guardianship is sought." If the duty of the attorney ad litem is to safeguard the ward's best interests, it does not necessarily follow that the attorney ad litem's duty is always to advocate the competency of the proposed ward. If a proposed ward should be protected by a guardianship, it is clearly not in his best interests for his attorney ad litem to advocate his competency.

Under the Texas Code of Professional Responsibility, a lawyer should represent a client zealously within the bounds of the law. Canon 7. The Ethical Considerations to Canon 7 also state as follows:

> Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. State Bar of Texas, Ethical Considerations on Code of Professional Responsibility EC 7-12 (1972).

The quoted ethical consideration may require that an attorney ad litem make a decision on behalf of the client

to advocate incompetnecy in a given situation. Such a position does not indicate a result from a conflict with such attorney's contemporaneous role as temporary guardian of the ward's person, such that the ward has lost effective assistance of counsel.

In any event, even if the temporary guardianship in this case had evolved into the unconstitutional deprivations of the Ward's rights, as alleged by Appellant and hereby denied, Appellant should have taken steps to dissolve the temporary guardianship. Instead, Appellant chose to continue to assert that she represented the Ward, but never sought probate court authority to do so. She chose to rely on the theory that she was furnishing legal services at the Ward's request. In this case she seeks payment for those legal services.

Finally with respect to the challenge relating to the Ward's right to counsel, there is no substantial federal question since the Ward was not denied the counsel of Appellant. (J.S. - p. 25). Appellant was allowed to participate in the guardianship proceedings, resulting in no deprivation of the constitutional right claimed. By contrast, in this case, the claim of Appellant is to payment for volunteered legal services during the pendency of a temporary guardianship, rather than denial of right to counsel of the Ward.

III. Adequate State Ground Exists.

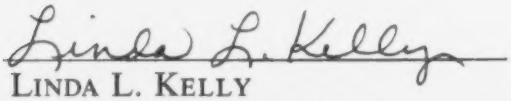
It is well-settled that this Court will not review a decision of a state court which rests upon adequate non-federal grounds. Where the highest state court delivers no opinion, as in this case, and it appears that the judgment might have rested upon a non-federal ground, the

Supreme Court will not accept jurisdiction. *Durley v. Mayo,* 351 U.S. 252 (1956). The adequate state ground upon which the judgment rests in this case is the Texas law that an attorney who institutes a temporary guardianship for a ward cannot, during the pendency of that guardianship, enter into a binding contract with the ward for legal services without court approval.

WHEREFORE, PREMISES CONSIDERED, Allied Bank of Texas, Temporary Guardian of the Estate of Nora Eichorn, N.C.M., respectfully requests that this Court dismiss Appellant's Appeal in its entirety for lack of jurisdiction; that all costs of this proceeding be taxed against Appellant; and that Appellee be granted such other and further relief as the Court deems proper.

Respectfully submitted,

DINKINS & KELLY

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellee's Motion to Dismiss was transmitted to Ms. Beverly L. Breaux, Appellant, by certified mail, return receipt requested, on the 10th day of November, 1986.

Linda L. Kelly

LINDA L. KELLY